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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 224

ELASTIC STOP NUT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pro. 6–23) [1] is reported in 142 F. (2d) 371. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 90–103) are reported in 51 N. L. R. B. 694.

JURISDICTION

The decree of the court below (Pro. 24–25) was entered on May 23, 1944. The petition for a

[1] In referring to the record, the same method is used as that followed in the petition for certiorari (Pet. 1, n. 1).

writ of certiorari was filed on July 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

The petition (pp. 2–3) purports to set out five distinct questions but, in our view, only two questions of substance are presented:

1. Whether the oral statements of petitioner's foreman to employees, announcing opposition to an "outside" union, warning against resort to legal process under the Act, and threatening reprisals for doing so, were privileged by virtue of the First Amendment to the Constitution.

2. Whether there is substantial evidence to support the Board's findings that petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the appendix to the petition for certiorari.

STATEMENT

Upon the usual proceedings under Section 10 of the Act (R. 90–92), the Board, on July 24,

1943, issued its findings of fact, conclusions of law, and order (R. 92–103). The facts, as found by the Board and as shown by the evidence, may be briefly stated as follows: [2]

In July 1942 petitioner, whose main plant is located in Union, New Jersey, opened a new plant at Lincoln, Nebraska, and began to hire an expanding force of employees to operate it (R. 93; P. A. 88–90, B. A. 7–8, 20). The employees at the new plant were interested in unionism but differed among themselves as to the preferability of a nationally affiliated union or an unaffiliated organization (R. 93; P. A. 25–26, 54, 80, B. A. 2, 13, 14, 19). In late August, while the decision of the employees was still in the formative stage, employee William Borner began circulating a petition "in favor of establishing an Independent Labor Union" (R. 94; P. A. 54, 55, 119). Foreman Valnoski assisted this movement (R. 99).[3] In answer to inquiries from several employees as to labor relations and conditions at petitioner's main plant, he made clear his view that an unaffiliated organization was serving the employees at that plant adequately, by remarking that if the employees there were not satisfied with it they

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[2] In the following statement references preceding the semicolon are to the Board's findings, and those following the semicolon are to the supporting evidence.

[3] Valnoski was one of two supervisors, who with Works Manager Hoffmann, were sent from the New Jersey plant to get the Nebraska plant started (R. 93; P. A. 103–104, 88–89).

would be transferring to an affiliated union (R. 93–94, 99; P. A. 15–18, 23, 24–25, 26–27, 37–38, B. A. 26). Similarly, he told employee Carl Arnold, when the latter showed him his A. F. of L. membership card, that petitioner did not "want the A. F. of L. or C. I. O. in here because you can't transfer a man from a department unless they let you" (R. 94, 99; P. A. 27–28, 37–38); and although he was aware that Borner was engaging in widespread solicitation of signatures to the petition for an "independent" union, in the plant during working hours (R. 94–96, 99; P. A. 28–29, 39, 40, 49–50, 52–53, 54, 55–56, 78–79, 119, B. A. 10, 15–16, 17), he did nothing to stop the circulation or dissipate the natural tendency of the employees to presume therefrom that petitioner approved what was being done (R. 96, 99–100).[4] By September 14, 44 out of the approxi-

[4] Valnoski denied knowing of the circulation of the petition in the plant (P. A. 94, 99–103), but the Board found (R. 95–96) that the record justified the inference, which it drew, that he had such knowledge. It based its inference upon the facts that Valnoski was in the plant during the period in question and acting in his capacity of foreman (P. A. 40), that only about 60 production employees were employed in the plant at the time (P. A. 109), and that the solicitation was widespread and continued for about 2 weeks (R. 94; B. A. 17). In these circumstances, the Board stated (R. 95), it was "unbelievable" that Valnoski "was completely unaware of what was taking place." As further basis for its inference, the Board also pointed to the facts that Valnoski knew before the circulation that organizational activities were being considered by the employees (*supra*, pp. 3–4), that he admitted at the hearing that he learned in September (the

mately 60 employees then employed had signed (R. 95, 96; P. A. 78, 109, 119).

Meanwhile, on September 10, Borner and about 8 other employees retained an attorney, and a committee discussed with the lawyer incorporation of an unaffiliated union, which it was decided to call the Employees Benevolent Association Union, herein called the Association (R. 96; P. A. 58–61, 63). On September 14, the group sponsoring the Association requested petitioner to recognize the embryonic organization (R. 96; P. A. 105–106). Petitioner again assisted that union by quickly granting the request, on September 15, solely on the basis of Borner's petition although, as appears from its face, that document did not, nor did it purport to, designate any representative but merely recited the employees' feeling in favor of an unaffiliated organization (R. 96, 99; P. A. 107–110, 119, B. A. 20–21). Petitioner at this time also agreed to meet with the inchoate Association on September 17 for bargaining purposes (R. 96; P. A. 109).

Following the grant of recognition earlier that day, the Association was formally organized on the

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same month the circulation occurred) that Borner and another employee were starting a union (P. A. 101), and that in January 1943 he gave a signed statement to a Board attorney in which he stated he knew these employees were circulating a petition in the plant (P. A. 125, 99–100). At the hearing Valnoski sought to explain the latter statement by testifying that he meant he learned of the circulation after it occurred but before January 1943 (P. A. 99, 100, 101), but the Board did not credit his "denial" (R. 95).

evening of September 15 at a meeting attended by about 19 employees (R. 96–97; P. A. 61–63). The same evening about 26 employees attended a meeting with an international representative of the International Association of Machinists, herein called the Union,[5] and 22 signed Union authorization cards (R. 96; P. A. 2, 9–10). On September 16, the Union notified petitioner that it claimed to represent the majority of the employees, and petitioner agreed to meet with it on September 18 (R. 97; P. A. 2–3). Petitioner, however, continued on September 17 to negotiate with the Association and within a few days, on September 23, agreed upon the terms of a full contract with it (R. 97; P. A. 110–112, 66–67, B. A. 18).[6] Petitioner further assisted the Association during this period by permitting it to post on the plant bulletin board a notice of a meeting on September 22 to discuss "the contract already drawn up and give the committee authority to sign the contract with the company officials" (R. 97, 100; B. A. 4, 11, 19, 28),[7]

[5] Then affiliated with the American Federation of Labor.

[6] The contract contained a provision granting the Association "the right to ask for the discharge of any factory worker * * * who fails, refuses, or neglects to become a member of said Association within thirty (30) days after becoming an employee * * *" (B. A. 30). Petitioner also agreed therein to advise all employees of the right of the Association to request their discharge should they fail to join the organization (*ibid.*).

[7] The bulletin board was near the time clock, about 40 or 50 feet from Foreman Valnoski's office (B. A. 9). The meeting, so announced, drew 33 employees of whom 21 were members

and by permitting without reprimand the collection of dues for the Association in the plant during working hours (R. 98; B. A. 5, 6, 13–14, 15, 16). On September 25, the contract was executed by the parties (R. 98; P. A. 69–70, B. A. 30).[8]

Meanwhile, on September 18,[9] the Union's request for recognition was rejected by petitioner solely on the basis that it had already recognized the Association (R. 97; P. A. 3, 4, 8, B. A. 21).[10]

On October 2, petitioner again refused to deal with the Union on the ground that it had a contract with the Association (R. 98; B. A. 1–2).

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of the Association and 15 to 17 were members of the Union (R. 97; P. A. 63, B. A. 3, 4, 5, 6, 11, 12). Apparently some employees were members of both.

[8] Petitioner had meanwhile learned, on September 24, that the Union had filed charges with the Board alleging that the Association was company dominated and supported (R. 98; B. A. 2, 22), but this likewise did not deter petitioner's entry into the contract with it. The two-day delay between the consummation and execution of the agreement was due to petitioner's request, on September 23, that the Association submit further proof of majority designation before the contract was signed (R. 97–98; P. A. 67–68, 87). On September 25, the Association presented membership cards showing a dues-paid majority (R. 98; P. A. 76–78, 87). In view of petitioner's prior recognition and illegal assistance of the Association, these designations were not expressions of the employees' free choice (R. 100).

[9] At a Union meeting the same evening, about 30 of the 60 production employees were present (R. 97; B. A. 1, P. A. 109).

[10] The Association's attorney was present at the meeting of September 18 at petitioner's invitation because of his interest in view of his client's status as the recognized agent (R. 97;

At about this time, petitioner permitted an Association leaflet attacking the Union to remain posted on petitioner's bulletin board for about 2 days (R. 98, 100; B. A. 9).

In November or December 1942, Valnoski told the Union's temporary president, Dillon, that "horseplay" and "foolishness" such as filing unfair labor practice charges against petitioner with respect to the discharge of one Sothan "would have to be stopped" (R. 98; B. A. 6–7, 8–9, 16–17).[11] The day before the hearing in the instant case began, Valnoski, in order to restrain employee Maistrell, who had been subpoenaed to testify as a Board witness, from testifying con-

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P. A. 4, B. A. 21). Petitioner's statements in its petition (Pet. 12, 25) that at the first meeting it told the Union's representative that if he could produce evidence of majority, petitioner "would give it consideration," but that he "declined to present any evidence," are misleading. It is true that petitioner's plant manager asked the Union's spokesman for proof of the Union's majority designation, and that the latter stated it was against the Union's "policy" to disclose the names of its members to employers (P. A. 8). The Union did, however, offer to submit proof to a Board representative, whereupon the plant manager stated that it was the Union's "privilege" to apply to the Board, but made it clear at the same time that he had recognized the Association and would not recognize the Union (R. 97; P. A. 3, 4, 8).

[11] The Union had filed an amended charge on October 29, alleging the discriminatory discharge of an unnamed employee (R. 98; B. A. 16–17). This employee was identified during the hearing as one, Vannest (B. A. 17), but Valnoski apparently thought he was Sothan. Petitioner's statement (Pet. 6) that "there is no evidence that any [charge] ever was made or filed by anyone at any time," is misleading.

cerning Valnoski's anti-Union activities (R. 99), warned him against telling "a lot of stuff about me up there," threatening that the employee "hadn't better, or it is going to be too bad" (R. 98; P. A. 116–117). When Maistrell returned to the plant after testifying, Valnoski accused him of having played "some dirty trick" on a female employee, and then added, "You know what I told you if you went up there and lied about me" (R. 98–99; P. A. 117–118).[12]

Upon the foregoing findings, the Board concluded that petitioner had interfered with, restrained, and coerced its employees. It found that Valnoski's statement to employee Arnold to the effect that petitioner did not want an affiliated union, and his threats and warnings with respect to filing charges and testifying under the Act, placed the employees under restraints with respect to their union activities, thereby violating Section 8 (1) of the Act (R. 99). It also found that petitioner assisted the Association in organizing the employees as opposed to the Union, thereby depriving the employees of "the complete freedom to choose between rival organizations which the Act contemplates," and further violating Section 8 (1) of the Act (R. 99–100). It ordered petitioner to cease and desist from its unfair labor practices, to withdraw and withhold recognition

[12] Maistrell had testified, *inter alia*, to conversations with Valnoski (P. A. 48–53).

from the Association unless and until it should be certified by the Board, and to cease giving effect to its contract with the Association (R. 102–103).

On October 22, 1943, petitioner filed in the court below a petition to review and set aside the Board's order (R. 1–5). The Board answered, requesting enforcement of its order (R. 6–10). On May 1, 1944, the court handed down its opinion enforcing the Board's order (Pro. 6–23). On May 23, 1944, a decree was entered in conformity with the opinion (Pro. 24–25).

ARGUMENT

1. Petitioner contends (Pet. 4–7, 14–19) that Foreman Valnoski's statement of disapproval of affiliated, as opposed to unaffiliated, unions, his warning that "horseplay" and "foolishness" such as filing charges with the Board must stop, and his threat that it would be "too bad" if an employee testified to a "lot of stuff" about Valnoski at the Board hearing (pp. 3–4, 8–9, *supra*), "at most expressed a preference for an unaffiliated union," and were "privileged free speech" under the First Amendment to the Constitution (Pet. 7, 19). Accordingly, it asserts, the court below erred in approving the Board's findings that the utterances violated Section 8 (1) of the Act. We submit, however, that this contention is without merit.

Contrary to petitioner's assertions that the utterances contained no "threat in coercion or

intimidation of the employees' right to join any labor organization" (Pet. 6–7, 14, 19), Valnoski's statement that the filing of charges must stop and his references to employee Maistrell's testimony at the Board hearing, carried on their face, as the Board found (R. 99), threats of reprisal if the employees proceeded in a manner inconsistent with the employer's wishes. Valnoski's subsequent accusation that Maistrell had played a "dirty trick" on a female employee and his pointed reminder at the same time that Maistrell recall Valnoski's earlier threat, were likewise coercive. And, as the court below stated (Pro. 12, *et seq.*), the Board was entitled to view Valnoski's expression of hostility to affiliated unions "not as an isolated incident or statement, but with due appreciation of its significance as part of a series of connected and related events * * *." Thus viewed in relation to the uncertain state of organization among the employees and to petitioner's entire course of pro-Association conduct during the period in question, this statement infringed the employee's right to freedom of self-organization.[13] As the court below

[13] This Court has repeatedly recognized the coercive effect of expressions of an employer's preference: "Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600. See also *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. (2d) 657 (C. C. A. 2), aff'd 312 U. S. 660; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78.

held (Pro. 18–19), such coercive conduct is not constitutionally protected merely because it involves the use of oral statements. See *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477.

In these circumstances the case at bar does not appear to present an appropriate occasion to pass upon the abstract question, upon which petitioner heavily relies in support of its petition (Pet. 14–19), whether, as the court below seems to have believed (Pro. 18–19),[14] the determination whether utterances are coercive is a question for the Board, whose findings thereon are entitled to acceptance by a reviewing court if supported by substantial evidence, or is one of law for the court. In the instant case, it is clear that in any event the Board's findings were correctly sustained by the court below. Nor, in these circumstances, does

[14] Petitioner's assertion (Pet. 7, note) that the court below "did not pass upon the merits of petitioner's claim of constitutional privilege" but held the question was one of fact which, for lack of power, it could not disturb, is inaccurate. It is clear from a reading of the court's opinion that it carefully reviewed the record to determine whether the Board's findings that Valnoski's utterances interfered with, restrained, and coerced the employees, were supported by substantial evidence. Upon such review, the court held that the requisite support for the findings existed, and that since, as the Board had found upon substantial evidence, the utterances "amount[ed], in connection with other circumstances, to coercion within the meaning of the Act," they were "not protected," and the court was bound to grant enforcement to them (Pro. 19).

the instant case seem to present an appropriate occasion to review an alleged conflict between the views of the court below in this regard and other cited cases (Pet. 14–18).

2. Petitioner attacks (Pet. 7–8, 14, 20–21) the Board's finding that Valnoski's statement that petitioner did not "want the A. F. of L. or C. I. O. in here * * *" (p. 4, *supra*), constituted interference, restraint, and coercion; it asserts that there is no evidence that the statement actually affected the employees' union activities, and that the evidence "affirmatively" shows the contrary. But, as the court below held (Pro. 16–17), and as is well settled, "Where the conduct was coercive, as found here, it is not necessary to show that the coercive conduct had its desired or intended effect." Contrary to petitioner's assertion (Pet. 20–21), there is no conflict with *National Labor Relations Board* v. *Mathieson Alkali Works,* 114 F. (2d) 796 (C. C. A. 4). As the court below pointed out (Pro. 17), that decision does not stand for petitioner's proposition, but rather supports the Board. See also *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. (2d) 951, 956 (C. C. A. 4), cited in *Mathieson Alkali* case. Moreover, the Board's order is fully supported without regard to this finding.

3. Petitioner's contention (Pet. 8–11, 14, 21–23) that there is no substantial evidence to support the Board's inference that Valnoski knew of

the circulation of the petition on behalf of an unaffiliated union in the plant during working hours, presents no question of general importance. Moreover, it, too, is amply supported by the evidence reviewed in the Statement (note 4, pp. 4–5, *supra*).[15]

4. Finally, petitioner contends (Pet. 11–14, 24–26) that the Board erred in holding that petitioner's recognition of the Association and entry into a contract with it constituted, in the particular circumstances of the instant case, unlawful assistance to that organization. This contention, likewise, presents no question of general importance warranting review by this Court. Moreover, the evidence reviewed in the Statement (*supra,* pp. 3–8), amply sustains the Board's finding (R. 100) that if petitioner had been neutral between the rival organizations, as it should have been, it would not have negotiated a contract with one of them until "its right to be recognized * * * had been finally determined under the procedures set up under the Act." Nor is there any conflict with the "holdings" in *Na-*

[15] Contrary to petitioner's claim (Pet. 20, 21–22), there is no conflict with *Consolidated Edison Co.* v. *National Labor* Relations Board, 305 U. S. 197, 229, *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, and cited decisions of various other circuit courts of appeals, defining "substantial evidence." The evidence reviewed in the Statement fully meets the approved tests. And there is no claim that the court below did not apply correct standards of substantiality.

tional Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584, 587; *National Labor Relations Board* v. *Mathieson Alkali Works*, 114 F. (2d) 796, 799, 800 (C. C. A. 4); and *National Labor Relations Board* v. *Swank Products, Inc.*, 108 F. (2d) 872 (C. C. A. 3), cited by petitioner (Pet. 24). Those cases merely state as dicta the undisputed proposition that an unaffiliated labor organization may, like an affiliated one, serve as the employees' statutory representative if freely selected. In the case at bar, however, the Board found (R. 99) upon substantial evidence (pp. 3–8, *supra*) that the Association was assisted by petitioner's showing of preference for it, by the permitted use of company time and property for organizational and other purposes, and by the precipitate grant of recognition on the basis of a petition for an "independent" union; and the Board concluded (R. 100) that in view of this unlawful aid and assistance petitioner's employees were not afforded "the complete freedom to choose between rival organizations which the Act contemplates."

Petitioner asserts (Pet. 25–26) that it was required under the Act to grant the Association recognition upon receipt of proof of majority. But petitioner here recognized the Association on the "basis of a petition which did not designate the Association as bargaining representative" but merely expressed preference for an "independent

labor union" (R. 100). Moreover, the Board has consistently held that an employer does not violate the Act when he refuses to deal with a union because of a competing union's rival claims or because of other good faith doubts as to its representative status, and courts have frequently indicated their approval of this rule. See, e. g., *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. (2d) 249, 251 (C. C. A. 1); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 868–869 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *National Seal Corp.*, 127 F. (2d) 776, 778 (C. C. A. 2); *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 556 (C. C. A. 6); *Polish National Alliance* v. *National Labor Relations Board*, 136 F. (2d) 175, 180–181 (C. C. A. 7), affirmed, No. 226, October Term 1943; *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. (2d) 404, 409 (App. D. C.), certiorari denied, 317 U. S. 659. Indeed, the Board's Rules and Regulations permit an employer to petition the Board for an investigation and determination of representatives where two or more labor organizations have presented conflicting claims that each represents a majority.[16]

[16] National Labor Relations Board Rules and Regulations, Series 2, as amended, then in effect, provided (Article III):

"Sec. 1. * * * A petition to investigate and certify under Section 9 (c) of the Act the name or names of repre-

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

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JULY 1944.

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sentatives designated or selected for the purpose of collective bargaining may be filed by * * * an employer. * * *

"Sec. 2. * * *

"(b) Such petition, when filed by an employer, shall contain the following:

* * * * *

"(5) A brief statement setting forth that a question or controversy affecting commerce has arisen concerning the representation of employees in that two or more * * * labor organizations have presented to the employer conflicting claims that each represents a majority of the employees * * *."

The current Rules and Regulations, Series 3, contain a like provision.

U. S. GOVERNMENT PRINTING OFFICE: 1944